

IN THE HIGH COURT OF BOMBAY AT GOA, PANAJI-GOA**SECOND APPEAL NO.27 OF 2000**

1. Shri Kishen Kumar Narandas Jobanputra,
 of Major Age, Son of Narandas Jobanputra,
 Residing At H.No.E-499,
 Almitante Reis, A.V. Panaji. Appellant

Versus

1. Shri Purushottam Mathurdas
 Raithatha Since Deceased through legal heirs:
 (a) Manjula Purushottam Raithatha,
 (b) Yogesh Purushottam Raithatha,
 (c) Devendra Purushottam Raithatha
 (d) Rupal Purushottam Raithatha
 (e) Tarika Purushottam Raithatha
 All Residing At Flat No.4, Building No.1, Model Housing
 Co-operative Society-La Campala Residency Colony,
 Miramar-Panaji.
 (f) Darshana D. Kotecha,
 Residing at E.49,Rua Almirante Reis, Panaji-Goa.

2. M/S. Goa Steel Trades,
 A Partnership Firm Duly
 Constituted Under The Indian Partnership Act, 1932,
 Having its Office at Panaji, through its Partner Purushottam
 Mathurdas Raithatha,
 The Respondent No.1 abovenamed Respondents

MRS. S. S. NAIK, ADVOCATE FOR THE APPELLANT

CORAM : **N. A. BRITTO, J.**

DATE : **9/12/2005**

ORAL JUDGMENT

This is defendant's Second Appeal arising from the Special Civil
 Suit No.85/86/A and was admitted by order of this Court dated 23/6/2000,

on a question of law which reads as follows:

Whether in the facts and circumstances the Court below was right in awarding mesne profits at the rate of Rs. 75/- per day?

2. The Respondent no.1, now represented by the legal heirs, were duly served, but have chosen not to contest this appeal. The Respondent no.2 as can be seen from the order of this Court dated 10/10/2002 was a firm which is no more in existence, and the partners of which are already on record as legal heirs of Respondent no.1.

3. The parties hereto shall be referred to in the names as they appear in the cause title of the said Civil Suit.

4. The Plaintiffs (Respondents before this Court) had filed the said Civil Suit for the eviction of the Defendant from residential House No.E-499 admeasuring about 177 sq. mts. belonging to one Shri Sertorio Coelho and situated at Father Agnelo Road at Panaji, of which the plaintiffs were the tenants and were paying to the said Sertorio Coelho a monthly rent of about Rs. 80/- upto the year 1981.

5. The Plaintiffs filed the suit for the eviction of the defendant on the allegation that the defendant was appointed as a godown keeper of the firm /plaintiff no.2 and was provided with effect from 26/11/1968 the said house as service accommodation on the condition that the defendant would

occupy the said house only during the tenure of his service and also provided the defendant with some furniture. It was further, the case of the plaintiffs that the defendant was not required to pay any rent of the suit house nor the charges towards the furniture supplied to him but was supposed to pay water and electricity bills for the power and water consumed by him during his occupation of the suit house.

6. The plaintiffs terminated the services of the defendant by notice dated 7/10/1985 and the defendant was directed to quit and vacate the suit house within 30 days from the termination of his service but since the defendant refused to vacate the suit house, for reasons stated by defendant, the plaintiffs filed the suit on 9/6/1986 for the eviction of the defendant.

7. During the pendency of the said Civil Suit the defendant vacated the house on 1/6/1990 and therefore the only issue which the trial court was required to decide was the issue of mesne profits claimed by the plaintiffs for the wrongful occupation of the suit house by the defendant from 8/11/1985 to 1/06/1990 at the rate of Rs.75/- per day. The learned trial Court after considering the evidence of PW 1 Purshottam M. Raithatha and that of Plaintiff's valuer namely PW 2 Subhash Chandra Bhobe came to the conclusion that the plaintiffs had failed to make out a case to claim mesne profits

8. The plaintiff's claim for mesne profits at the rate of Rs.75/- per

day was explained by the plaintiffs in the evidence of PW 1. PW1 had stated that incase he had not given the suit premises to the defendant, he would have accommodated at least 20 beds to use the suit house as a lodging house and that could have fetched the profits of Rs.75/- per day. However, he had admitted that he could not have sublet the suit house, being a tenant. PW 2 Shri Bhobe had fixed the fair rent of the suit house by a report dated 25/4/1995 and in the said report he fixed the fair rent for November, 1985 in the sum of Rs.2,650/-, for November, 1988 in the sum of Rs.3271/- and for November, 1991 in the sum of Rs.3984/- .

9. The learned trial court observed that the plaintiffs had failed to produce evidence on record to show that there was an offer made to them for converting the suit house into a lodging house or that they had made any efforts for such conversion after issuing termination notice to the defendant and that there was nothing of this sort on record. The learned trial court also noted that there was also nothing on record to suggest that the plaintiffs had converted the suit house into lodging house after 1/6/1990 that is to say after the surrender of the suit house by the defendant, inspite of the fact that evidence of the defendant was completed in October 1997. The learned trial court therefore dismissed the claim of the plaintiffs for mesne profits.

10. The plaintiffs having filed an appeal before the District Court, the learned Additional District judge by her Judgment/Order dated 22/03/1999 was pleased to allow the claim of the plaintiffs for mesne profits

till the date the possession was surrendered by the defendant to the plaintiffs. The learned Additional District Judge observed that the plaintiffs had produced evidence to show that the suit premises in respect of which rent of Rs. 80/- per month was being paid could fetch fair rent as stated by the valuer and therefore the learned trial court could not have proceeded to hold that there was no material produced by the plaintiffs to fix the mesne profits of the suit house. The learned Additional District Judge also brushed aside the defendant's submission that a tenant could not have claimed mesne profits, as not tenable. The learned Additional District Judge further observed that the usage of the suit house by the defendant was purely under the terms of employment and as service accommodation and therefore no illegality could be foreseen in the action of the plaintiffs to seek compensation or mesne profits for wrongful use of the suit house under their tenancy and that the plaintiffs would be otherwise put to jeopardy for providing accommodation to some other employee at a premium only because the suit premises had not been vacated by the defendant and these aspects were overlooked by the trial court.

11. At the time of the hearing of this appeal learned Advocate Mrs. Naik has submitted that the plaintiffs having been tenants could not claim mesne profits and whether the plaintiffs as tenants could have claimed mesne profits has not been disused by the learned Additional District Judge. She has however submitted that even after the defendant vacated the suit premises and even much thereafter, no license was obtained from the

authorities to let out the suit premises in the manner as stated by the plaintiffs.

12. Learned Advocate Mrs. Naik has placed reliance on the case of ***Smt. Chander Kali Bail & Others Versus Jagdish Singh Thakur & Another*** (AIR 1977 SC 2262) and has submitted that the defendant's occupation would not have been wrongful till the defendant himself vacated the premises unless a decree for the defendant's eviction was passed against him.

13. In the above case the Supreme Court with reference to the word 'tenant' in Madhya Pradesh Accommodation Control Act, 1961, has stated that a tenant even after the termination of its contractual tenancy does not become an unauthorised occupant of the accommodation but remains a tenant. Further, the Supreme Court has stated that in ***Damadilal and Others Versus Parashram and Others*** (AIR 1976 SC 2229) such tenant is conveniently called a statutory tenant and, whether the aforesaid expression was borrowed from the English Law is quite apposite or not but what is certain is that a person continuing in possession of the accommodation even after the termination of his contractual tenancy is a tenant within the meaning of the Act and on such termination his possession does not become wrongful until and unless a decree for eviction is made. If he continues to be in possession even after the passing of the decree, he does so as a wrongful occupant of the accommodation. This was a case between a landlord and tenant and certainly not between a tenant and his employee.

14. The above decision of the Supreme Court has been distinguished in another decision of this Court, relied upon by Mrs. Naik, in case of *Smt. Purificacao Fernandes Versus Dr. Hugo Vicente de Perpetuo Socorro Andrade Menezes & Others* (AIR 1985 Bombay 202) stating that the case of *Smt. Chander Kali Bail & Others* was a case where the eviction of a tenant had been sought and ordered on account of non payment of rents. Under the relevant legislation, the tenant could have avoided his eviction by paying the rents and, therefore, it was only because the tenant had not availed himself of this benefit that the eviction has been ordered and it was in the context of particular facts of that case the Supreme Court observed that the mesne profits were to be paid only from the date of the decree. In my view the defendant can derive no benefit from the observations of the Supreme Court in the case of *Smt. Chander Kali Bail & Others*.

15. The evidence of PW 1 Raithatha was based on assumptions that the plaintiffs could convert the suit house into a lodge by putting beds and earn a monthly income of Rs.75/- per day. Likewise the evidence of PW 2, Shri Bhobe appears to be that in case the plaintiffs were to let out the suit house they would be in a position to earn fair rent at the rate assessed by him. However, it was admitted by PW 1 Raithatha that the plaintiffs were not entitled to sublet the premises. Since the plaintiffs themselves were the tenants of the said Shri Sertorio Coelho it was necessary for the plaintiffs to have shown that the plaintiffs were entitled to, under the terms of tenancy held by them, to sublet the suit house and earn profits there from and this on

the assumptions that mesne profits are linked with benefits that the owner of the land or for that matter the tenant of the suit house may get from the land or the suit house by letting it to others.

16. However, the concept of mesne profits appears to be different. Section 2(12) of C.P.C. defines mesne profits to mean those profits which the person in wrongful possession of such property actually received or might with ordinary diligence have received therefrom, together with interest on such profits, but shall not include profits due to improvements made by the person in wrongful possession. The words 'Mesne Profits' suggests value of house for occupation of land during the time it was held by one in wrongful possession and is commonly measured in terms of rents and profits (see Black's Law Dictionary). The Apex Court in the case of ***Fateh chand Versus Balkrishna Dass*** (AIR 1963 SC 1405) observed that the normal measure of mesne profits is the value of the user of the land to the person in wrongful possession. That view was followed by this Court, as stated in the case of ***Smt. Purificacao Fernandes*** (supra) by a division bench of this Court in the case of ***M/s. Kakubhai & Co. Versus Nathmal Kisanlal*** (AIR 1980 Bom. 25). This Court reiterated in ***Smt. Purificacao Fernandes*** (supra) that nowhere, mesne profits are linked with any benefits that the owner of the land may get from the said land and that mesne profits correspond to the profits which a person in wrongful possession is receiving or might receive with due diligence for such wrongful occupation to the owner of the land. In the case at hand, the defendant was occupying the suit house as one of the terms of his

employment with the plaintiffs and without paying any rent or compensation to the plaintiffs. The plaintiffs had led no evidence to prove as to what would be the compensation which the defendant might have received with due diligence for his wrongful occupation of the suit house and that being so the plaintiffs were certainly not entitled to claim any mesne profits from the defendant, notwithstanding the fact that the defendant had not controverted the evidence of AW 2 Shri Bhobe, as otherwise held by the learned first Appellate Court.

17. In view of the above this Second Appeal deserves to succeed. The question framed is answered accordingly as substantial question of law. As a result Judgment/Order dated 22/3/1999 of the learned Additional District Judge is hereby set aside and that dated 29/8/1998 of the learned Civil Judge is restored, with no order as to cost.

N.A. BRITTO, J.

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